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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS
VS:
DESKINS BRANCH
COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH
COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

MAY IT PLEASE THE COURT:

The appellees, Hon. Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins and Glenn Schilling, Members of and Comprising the Workmen's Compensation Board and the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General, Commnowealth of Kentucky, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final Order and Per Curiam Opinion of the United States District Court for the Eastern District of Kentucky be affirmed on the ground that the issues on which the deci-

sion of this case depends are so unsubstantial as not to warrant further argument.

STATEMENT OF THE QUESTIONS PRESENTED

I. **WHETHER THE QUESTIONS IN THE INSTANT CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT?**

II. **WHETHER THAT SECTION OF THE KENTUCKY WORKMEN'S COMPENSATION ACT, TREATING ALL COAL MINERS COVERED BY THE FEDERAL BLACK LUNG ACT AND WHO APPLY FOR STATE WORKMEN'S COMPENSATION BENEFITS AFTER JANUARY 1, 1973, DIFFERENTLY FROM ALL OTHER PERSONS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS UNDER KENTUCKY LAW, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?**

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATE STATUTES

This appeal involves the 1972 amendments to the Kentucky Workmen's Compensation Act (Kentucky Revised Statutes, Chapter 342), particularly Section 37 of Senate Bill 184 (1972 Acts, Chapter 78, Section 37), which provides as follows:

"Effective date. This Act shall be effective on

January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be held as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims. (1972, c. 78, § 37; effective date clause, not compiled.)"

The particular section quoted immediately above has been discussed and interpreted by the Kentucky Court of Appeals in three recent decisions: *Maggard* v. *International Harvester Company*, Ky., 508 S.W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975); and *Fugate* v. *United States Steel Corporation*, Ky., _____ S.W. 2d _____ (decided May 9, 1975. These decisions also appear at pages 16A through 60A of Appellants' Appendix (D).

B. THE PROCEEDINGS BELOW

The Order and Per Curiam Opinion of the United States District Court for the Eastern District of Kentucky entered March 31, 1975, dismissing appellants' action and holding that the Kentucky Workmen's Compensation Act as amended (1972 Acts, Chapter 78, Section 37) does not violate the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution is not reported. A copy of the Order and Per Curiam Opinion is found at pages 1A through 8A of Appellants' Appendix (A).

The appellants, Chester Slone, Abel Chapman, Jr., Phillip Anderson and Cledis Kinney are Kentucky coal miners, allegedly last exposed to the occupational hazards of coal workers pneumoconiosis (Black Lung) and disabled in 1973. They sought injunctive and declaratory relief under the authority of Federal law against the Kentucky Workmen's Compensation Board's procedure (pursuant to the Kentucky Revised Statutes) whereby Kentucky Workmen's Compensation Benefits payable to coal miners with coal workers pneumoconiosis are not increased in 1973, as they are for other persons entitled to state compensation benefits, when those coal miners are eligible for benefits under Federal law.

Pursuant to appellants' motion a three-judge court was convened. That court entered an order on November 27, 1974 abstaining from a consideration of this case until the Kentucky Court of Appeals first considered the allegation that the Kentucky Workmen's Compensation Act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975)

Subsequent to the decision of the Kentucky Court of Appeals in *Chapman*, supra, upholding the constitutionality of the section of the Kentucky Workmen's

Compensation Act challenged by appellants, the three-judge court entered its Order and Per Curiam Opinion dismissing appellants' action. The three-judge court concluded in part that the section of the Kentucky Workmen's Compensation Act complained of is constitutional and that there is a rational relationship between Kentucky's statutory scheme and the legitimate state interest which it was intended to serve.

ARGUMENT

I. THE ISSUES IN THE INSTANT CASE DO NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT.

This Court has on innumerable occasions through the years been confronted with appeals alleging that a substantial federal question under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is being presented. An examination of the pertinent standards and principles and their application to the specific state statutory provision complained of in this case will demonstrate that substantial federal questions are not involved here. Review by this Court is, therefore, not warranted.

Before considering the provision of the Kentucky Workmen's Compensation Act challenged by appellants, it may be helpful to consider prior decisions of this Court and other Federal Courts involving the con-

cept and application of Equal Protection under the Fourteenth Amendment to the United States Constitution. At the outset it should be noted that in determining the validity, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, of a state statute the proper standard of judicial review is the traditional standard, requiring that the state system be shown to bear some rational relationship to a legitimate state purpose, rather than the strict judicial scrutiny standard, requiring the showing of a compelling state interest.

In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) this Court in determining the validity, under the Equal Protection Clause of the Fourteenth Amendment, of a state statute for financing public education, applied the traditional standard as education is not among the rights afforded explicit protection under the Federal Constitution. It was stated in *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973), that under the "traditional" equal protection analysis a legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. Classifications based upon sex, race, alienage and natural origin are subjected to close judicial scrutiny.

This Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. A classification must be reasonable, not ar-

bitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation in order that all persons similarly circumstanced shall be treated alike. See *Reed* v. *Reed,* 404 U.S. 71, 76, 30 L. Ed. 2d 225, 229, 92 S. Ct. 251 (1971) and *U.S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973).

While it has been said that the prohibition of the Equal Protection Clause goes no further than invidious discrimination no precise formula has been developed in this area. In *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 489, 99, L. Ed. 563, 573, 75 S. Ct. 461 (1955) it was said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think."

The case of *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101 (1961) discussed in part the lack of a precise definition concerning the permissible scope of state legislation:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures

> are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *McDonald* v. *Bd. of Election Com. of Chicago,* 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969), this Court said that state legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. The test is not whether one class of individuals is treated differently from others but whether the difference in treatment is an invidious discrimination, *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973).

While there do not appear to have been many cases before this Court in the area of Equal Protection as applied to Workmen's Compensation Acts, this Court has considered many Equal Protection arguments in the field of economic and social welfare. In *West Coast Hotel Company* v. *Parrish,* 300 U.S. 379, 81 L. Ed 703 (1937), this Court said, in regard to a state minimum wage statute, that even if the wisdom of the statute is regarded as debatable and if its effects are uncertain such matters are for the legislature and not the courts. Furthermore, legislative regulation is not discriminatory because it is not extended to all cases which it might possibly reach. The legislature may confine its restrictions to

those classes of cases where the need is deemed to be greatest and legislation need not be crouched in all embracing terms.

This Court in *Dandridge* v. *Williams,* 397 U.S. 471, 485, 25 L. Ed. 2d 491, 501, 90 S. Ct. 1153 (1970), dealt with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' "

In *Jefferson* v. *Hackney,* 406 U.S. 535, 546, 32 L. Ed. 2d 285, 296, 92 S. Ct. 1724 (1972), it was stated:

> "A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v. Lee Optical Co. 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and needy are not subject to a constitutional straitjacket. The very complexity of the problems

suggests that there will be more than one constitutionally permissible method of solving them."

The Equal Protection Clause does not require a state administered Unemployment Compensation Disability Fund to finance payments of benefits to those women whose disability is attributable to normal pregnancy and delivery (The program had excluded those disabilities from coverage but covered disabilities from abnormal pregnancies). The state has a legitimate interest in maintaining the self-supporting nature of its program and need not sacrifice that aspect to increase benefits or extent of coverage. As long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. A state is not required to choose between attacking every aspect of a problem or not attacking the problem at all. *Geduldig* v. *Aiello,* 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. ——— (1974).

Thus, in dealing with social or economic legislation or areas where fundamental rights are not involved a greater latitude is afforded legislative classification and a statutory classification will not be set aside if a rational basis exists to sustain it. *United States* v. *Craven,* 478 F. 2d 1329 (6th Cir. 1973). Every minor difference in the application of laws to different groups does not constitute a constitutional violation. Whether a violation exists depends upon the facts and circumstances behind the law, the interest which the state claims to be protecting and the interests of those disadvantaged by the classification. *Salyer Land Company* v. *Tulare Water*

District, 410 U.S. 719, 35 L. Ed. 2d 659, 93 S. Ct 1224 (1973).

The Courts have also held that there is no need for one program to duplicate the needs of another program. An individual whose social security disability benefits were reduced pursuant to the Social Security Act, providing for the reduction of such benefits to any person also receiving workmen's compensation benefits, was not subject to arbitrary discrimination as between disabled employes who receive Workmen's Compensation and those who receive compensation benefits from private insurance or from tort claim awards. Two unlike classes cannot be made indistinguishable by attaching to them a common label. See *Richardson* v. *Belcher,* 404 U.S. 78, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971) and *Lofty* v. *Richardson,* 440 F. 2d 1144 (6th Cir. 1971).

Several of the cases cited by appellants, including *Weber* v. *Aetna Casualty & Surety Company,* 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619, 36 L. Ed. 2d 543, 93 S. Ct. 1700 (1973); and *Jimenez* v. *Weinberger,* 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. ——— (1974), involve the rights of illegitimate children. Under these cases workmen's compensation acts, the Social Security Act and state welfare programs cannot deny benefits, available to legitimate children, to illegitimate children solely because of their illegitimacy. These cases are not similar to that of the appellant coal miners who as a group have rights under both state and federal laws.

The issues raised by appellants in the instant case do not raise substantial federal questions under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution so as to warrant review by this Court.

II. THAT SECTION OF THE KENTUCKY WORKMEN'S COMPENSATION ACT, TREATING ALL COAL MINERS COVERED BY THE FEDERAL BLACK LUNG ACT, AND WHO APPLY FOR STATE WORKMEN'S COMPENSATION BENEFITS AFTER JANUARY 1, 1973, DIFFERENTLY FROM ALL OTHER PERSONS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS UNDER KENTUCKY LAW, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT.

An application of the pertinent standards and principles to the specific Kentucky statute involved reveals that the Kentucky and lower federal court decisions correctly concluded that the Kentucky legislative scheme is constitutional and not in violation of the Equal Protection concept embodied in the United States Constitution. The specific section of the State act complained of by appellants (Section 37 of Senate Bill 184, 1972 Acts, Chapter 78, Section 37, set forth previously by these appellees) has been discussed and interpreted in several recent opinions of the Kentucky Court of Appeals and these decisions may be of assistance to this Court in resolving the questions presented.

In *Maggard* v. *International Harvester Company,*

Ky., 508 S.W. 2d 777 (1974), the Court of Appeals of Kentucky construed the section of the Kentucky Act involved herein to mean that if a claimant was eligible to file for benefits under the Federal Black Lung Law he could not recover the increase in monetary benefits provided by the 1972 amendments to the State Act. The legislative intent was to exclude black lung claimants, whose last exposure to the hazards of the occupational disease occurred in 1973, from the increase in payments available to other workers who became injured or disabled in 1973. Black lung claimants already are the beneficiaries of special legislation enacted by the Congress of the United States and one effect of the state law was to leave any additional financial burden with respect to black lung claimants upon the taxpayers of the United States instead of the coal industry so long as Congress saw fit to make public money available.

In *Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (1975), it was contended that the denial of increased monetary benefits to black lung claimants whose claims arose during 1973 works an invidious discrimination and thus violates the Equal Protection Clause of the Fourteenth Amendment as between them and other covered employes disabled during the same period of time from causes other than black lung. The Court of Appeals, in discussing the constitutionality of the classification scheme and recognizing that there are financial differences because of the classification, said in part at page 393 of its opinion:

". . . The goal here seems to have been to defer placing an economic burden upon the coal industry until it was no longer being carried on other shoulders. Though we do not defend it, our prerogative as a court does not extend beyond determining whether such an objective is a reasonable basis for the exercise of legislative power, and we cannot avoid the conclusion that it is. *As we understand the constitutional protection against unreasonable discrimination, it is the reason for rather than the amount of the difference that is of primary importance. . . .*" (Emphasis added).

As the Court of Appeals pointed out in *Chapman,* supra, at page 394 of its opinion, it was the United States Congress, a political body, which finally bridged the casual gap that medicine had been hesitant to cross and provided federal benefits for black lung which most other workmen in most other states, whether disabled by disease or by injury, were not and are not entitled. See 30 U.S.C.A. §901 et seq. Science, history and politics all have combined to put black lung in a different class from other work-connected disabilities and it has traveled a road of its own.

The Federal Black Lung provisions as amended provide in part that any claim for benefits due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law except that benefits are payable under the Federal provisions when applicants are not covered by state law. A State workmen's compensation law shall be deemed not to provide adequate coverage for pneumoconiosis unless it is included in the list of State laws found by the Secretary of Labor to provide adequate

coverage. See 30 U.S.C.A. §§ 931-932. As noted in *Fugate* v. *United States Steel Corporation,* Ky., _____ S.W. 2d _____, (decided May 9, 1975 and found at Appellants' Appendix 54A-60A) the Secretary of Labor has not yet listed any state as providing adequate coverage for pneumoconiosis.

The Federal Government has singled out coal miners with pneumoconiosis or Black Lung for special treatment. Kentucky coal miners who allegedly have pneumoconiosis or Black Lung have a remedy for obtaining Federal benefits. The State has denied benefit increases to State Black Lung claimants as long as the Federal program applicable to Kentucky coal miners remains in effect. All Kentucky coal miners alleging the presence of the disease of pneumoconiosis or Black Lung are treated equally.

While admittedly in some instances Kentucky coal miners would receive smaller benefits under the Federal program than under the State Workmen's Compensation Act, such fact by itself does not mean that the Kentucky provisions are unconstitutional. In some instances Federal benefits are higher, particularly, when the number of dependents is greater. Furthermore, the amount of weekly State benefits is determined by the year in which the person became injured or diseased and remains fixed while Federal benefits are keyed to a percentage of the salary schedule of Federal employes in grade GS-2 and will undoubtedly increase over the years. As previously stated, however, the reason for rather than the amount of the difference is of primary importance.

Kentucky coal miners with the occupational disease of pneumoconiosis or Black Lung do not receive the increased state workmen's compensation benefits afforded other state workers but that is because of the existence of the Federal program for occupationally diseased miners. The Federal Government has singled out this group of coal miners for special attention and Kentucky has treated all members of this classification equally under its statutes although differently from other state workers.

State Workmen's Compensation Acts seldom treat all workers equally but as long as the members of each classification are treated equally no discrimination exists. Kentucky, for example, excludes domestic servants and agricultural workers from coverage. See KRS 342.650 "Exemptions."

Thus, treating all coal miners with pneumoconiosis or Black Lung differently from other workers is not discriminatory in view of the federal program existing only for this specific group of coal miners. The Kentucky General Assembly, in dealing with the specific problem of coal miners affected with pneumoconiosis or Black Lung, has not discriminated against them, in violation of the Equal Protection Clause of the Fourteenth Amendment. There is a rational relationship between the state purpose being served and the Kentucky classification created in achieving that purpose.

CONCLUSION

These appellees submit that the questions upon which this cause depends do not raise substantial Federal questions under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and are so unsubstantial as not to require any further argument. These appellees move the Court to affirm the Judgment of the three-judge court of the United States District Court for the Eastern District of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carl T. Miller, Jr., one of counsel for appellees, Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins and Glenn Schilling, Members of and Comprising the Workmen's Compensation Board and the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General, Commonwealth of Kentucky, hereby certify that copies of the foregoing Motion to Affirm were on the _____ day of July, 1975 served on the several parties as follows:

1. On the appellants by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. C. Kilmer Combs, Attorney at Law, Post Office Box 112, Pikeville, Kentucky 41501.

2. On the appellees, Deskins Branch Coal Company; Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. William J. Baird, Attorney at Law, Baird and Baird, Post Office Box 351, Pikeville, Kentucky 41501.

3. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. Cyril E. Shadowen, Attorney for the Commissioner of Labor and Special Fund, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202.

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